UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

NORTHWEST CENTER FOR ALTERNATIVES TO PESTICIDES, *et al.* *Plaintiffs*, v. NATIONAL MARINE FISHERIES SERVICE, *Federal Defendant.*	CASE NO. 07-1791-RSL **DECLARATION OF MARIETTA ECHEVERRIA**

I, Marietta Echeverria, state the following:

1. I declare that the following statements are true and correct to the best of my knowledge and belief and are based on either my personal knowledge, my review of information contained in the records provided to this Court or evaluations of such records supplied by current U.S. Environmental Protection Agency ("EPA" or the "Agency") employees.

2. I am the Director of the Environmental Fate and Effects Division ("EFED") in EPA's Office of Pesticide Programs ("OPP"). I have worked for EPA for 15 years. I have served in various positions within EPA, including Physical Scientist, Team Leader, and Branch Chief in EFED; and Senior Advisor and Branch Chief in the Registration Division ("RD"). I have been the Director of EFED since November 2016.

3. EFED is the division assigned with the responsibility for assessing the ecological

risk and environmental fate of both new and existing conventional pesticides under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"). Part of this responsibility includes evaluating effects to species listed as threatened or endangered ("listed species") under the Endangered Species Act ("ESA") and preparing the biological evaluations that EPA provides to the National Marine Fisheries Service ("NMFS") and the Unites States Fish and Wildlife Service ("FWS") (collectively "Services") when it consults with the Services on pesticide actions that "may affect" listed species or their designated critical habitat. EPA's consultation obligations under the ESA involve extremely complex scientific assessments because rather than addressing effects of a discrete project at a specific location, EPA's pesticide registration actions effectively address the entire United States and therefore involve the potential for effects to hundreds of listed species in numerous and varying aquatic and terrestrial habitats.

4. Pursuant to a stipulation and order entered by this Court on May 21, 2014 ("the May 2014 Order"), and a parallel stipulation in *Center for Biological Diversity v. United States Fish and Wildlife Service*, No. 3:11-cv-5108-JSW (N.D. Cal., July 28, 2014) (Exhibit 1), the Services agreed to complete nationwide consultations on FIFRA pesticide registrations for the insecticides chlorpyrifos, diazinon and malathion by December 31, 2017.[1] These consultations represent the initial set of nationwide consultations being conducted in furtherance of the April 30, 2013 National Academy of Sciences (NAS) recommendations to EPA and the Services for conducting consultations on pesticide registration actions. And, in fact, they represent the first set of nationwide consultations ever conducted between EPA and the Services on FIFRA pesticide registrations. Prior to these consultations, the only consultations on FIFRA actions

[1] The settlement agreement in *Center for Biological Diversity v. United States Fish and Wildlife Service*, No. 3:11-cv-5108-JSW (N.D. Cal.) provides, in the alternative, for negotiations concerning potential regional consultations to the extent FWS does not issue a nationwide biological opinion before December 31, 2017.

completed between EPA and the Services had addressed a subset of the EPA's registration action at issue, or a subset of the species that could potentially be affected by EPA's registration action. Given EPA's obligation to complete the reevaluation of all existing pesticides (which includes all approved uses of such pesticides) under the registration review provisions of section 3(g) of FIFRA, EPA and the Services recognized the need for ESA consultations addressing all use of these pesticides across the country. Addressing this obligation would be unlike any other pesticide consultations EPA and the Services had previously conducted. In light of the complex and novel nature of the undertaking, the agreed upon December 2017 deadline for completing our consultations has proven challenging.

5. While the May 2014 Order does not specifically address EPA's and NMFS' internal time lines for completing the steps necessary to issue the biological opinions by December 2017, these steps were laid out by EPA and the Services in connection with the stipulation in the *Center for Biological Diversity* identified in above in paragraph 4. EPA and the Services provided the parties in that matter with EPA's and the Services' tentative milestones (the "Milestone document") (See Exhibit 2) for completing the consultation process, including EPA's planned dates for submitting its biological evaluations to the Services to commence consultation, as well as the Services' dates for developing draft biological opinions for public comment and for issuing final biological opinions.

6. In the Milestone document, EPA estimated that it would submit its biological evaluations for chlorpyrifos, diazinon and malathion to initiate consultation to FWS and NMFS by March 2016. While EPA understood when it started developing the biological evaluations that they would be of greater scope and complexity than any such documents that EPA/OPP had previously developed, the nature and extent of the undertaking, including the extent of public

comments, greatly exceeded EPA's expectations. The biological evaluations for the three insecticides address the potential effects of over 100 discrete uses on the over 1800 listed threatened and endangered species nationwide (including effects to any designated critical habitat for such species) and over 10,000 pages each. When EPA issued its draft biological evaluations for comments in April, 2016, EPA received comments from over 70,000 individuals (which included pesticide registrants, growers, food processors, environmental organizations, academics, various governmental entities as well as unaffiliated members of the public). While most of the comments were form letters, approximately 120 raised detailed scientific points requiring significant EFED review. EPA's final biological evaluations for chlorpyrifos, diazinon and malathion are available at https://www.epa.gov/endangered-species/implementing-nas-report-recommendations-ecological-risk-assessment-endangered-and.

7. As a result of the magnitude of the undertaking and the comments received, EPA's final biological evaluations were not issued until January 2017, approximately 9 months beyond the date EPA and the Services had previously estimated in the Milestone document, giving the Services significantly less time than previously estimated for the completion of their biological opinions that are to be based on the EPA biological evaluations.

8. As provided in the Milestone document, EPA and the Services anticipate releasing draft biological opinions for the public in advance of developing any final biological opinions. While the ESA and the Services' consultation regulations do not require the Services to issue draft biological opinions for public comment, given the broad extent of public interest in the evaluation and licensing of pesticides for use across the country, Congress, EPA and the Services have all agreed that meaningful public participation is a critical part of the consultation process on pesticide actions under FIFRA. Specifically, Section 10013 of the Agricultural Act

of 2014 (P.L. 113-79) directed EPA, the Services and USDA to, among other things, develop a report to inform Congress of specific actions that have been and will be taken to "ensure public participation and transparency in the development of reasonable and prudent alternatives and reasonable and prudent measures." Because reasonable and prudent alternatives and reasonable and prudent measures can be among the most critical elements of a biological opinion, it is clear that Congress anticipated that EPA and the Services would provide opportunities for public involvement.

9. EPA and the Services have addressed that Congressional directive by developing a "stakeholder" process that specifically calls for EPA to receive public comments on draft Service biological opinions and to allow the Services to address those comments before completing any final biological opinions addressing pesticide registration actions under FIFRA. In a document entitled Enhancing Stakeholder Input in the Pesticide Registration Review and ESA Consultation Processes and Development of Economically and Technologically Feasible Reasonable and Prudent Alternatives (available at https://www.regulations.gov/document?D=EPA-HQ-OPP-2012-0442-0038), EPA explained that,

> [t]he Services will provide EPA with the draft biological opinion for their review. EPA will make the draft biological opinion available for public comment. The public comment period provides another opportunity for stakeholders to provide valuable input on [Reasonable and Prudent Alternatives, Reasonable and Prudent Measures], and terms and conditions, as well as to provide/suggest/propose alternate risk reduction measures that accomplish the same protection goals but may be easier/less costly for the grower/user community to implement. All comments will be submitted to EPA, although the applicant may send a copy of its comments directly to the Service. EPA will organize the comments and highlight those of particular note and provide them to the Services.
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> During the public comment period, EPA and the Services, supported by USDA, will solicit input from growers and other stakeholders on any

> technologically and economically feasible approaches that minimize the impact on growers and that allow them to meet their pest control needs while achieving the necessary protection goals to avoid jeopardy to threatened and/or endangered species. In particular, this process should offer stakeholders an opportunity to provide data and to identify practical considerations that affect the viability of different options for mitigating risks to species. EPA will provide a key role by focusing affected entities on the availability of the draft biological opinion and timeframes for submission of input.
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> Upon receipt of the organized public comments from EPA, each Service will prepare a document for their respective opinions, where applicable, and include it in the administrative record that addresses how comments were considered and, if appropriate, how the final document was modified to address the comments. Each Service will include this document in their respective administrative records and will provide it to EPA. Both the Services and EPA will make the document available to the public upon request.

10. Given this document and the direction from Congress clearly indicating that the agencies should ensure that opportunities exist for public input on the measures the Services may put forth in biological opinions addressing pesticide registration actions, EPA believes that NMFS should have the time necessary to provide EPA with a draft biological opinion in order to allow EPA to publish the draft opinion for public comment and for NMFS to carefully consider the comments it receives.

11. EPA believes, however, that the agencies will reasonably need an additional year before EPA publishes the draft NMFS biological opinion for public comment. This time frame is necessitated both by the extended amount of time that was needed to finalize the biological evaluations and send them to NMFS, as outlined above in paragraphs five through seven, and to address issues with respect to the agencies' assessment methodologies raised during interagency discussions and by stakeholders during the public comment period. It is important to reiterate that the biological opinions on chlorpyrifos, diazinon and malathion represent the first nationwide consultations on pesticide registrations that EPA and the Services have ever undertaken and are also the first opinions being completed pursuant to methodologies

implementing the 2013 NAS report recommendations. These consultations were intended to be pilot consultations that would actually result in the development and refinement of the methodologies through an iterative process. Given where the agencies are in the consultation process, EPA expects the additional year would be divided into an initial six months for NMFS to provide a draft of its opinion to EPA and an additional six months for EPA to provide feedback to NMFS, and for NMFS to consider EPA's feedback and complete a draft for EPA to publish for comment.

12. With respect to EPA's part of the public comment process, once NMFS provides EPA with its draft biological opinion for public comment, EPA would then take steps to post the document(s) on its website and receive comment through the Regulations.gov website. After the close of the comment period, EPA would then compile the comments received, highlight significant comments, and provide them to the Services. EPA estimates that its role in this process would take approximately 180-240 days to complete, which includes development and posting of web materials informing the public that the comment period is open, a 60-day public comment period (which may be extended if EPA determines that an extension request is justified in light of the length and/or complexity of the biological opinion). This timeframe is also intended to accommodate time for EPA to develop its response to NMFS if EPA concludes that the draft biological opinion does not adequately address any issues raised by EPA earlier in the consultation process.

Pursuant to 28 U.S.C. Section 1746, I declare under penalty of perjury that to the best of my knowledge the foregoing is true and correct. Executed on this 8th day of November, 2017.

Marietta Echeverria

Marietta Echeverria
Director of the Environmental Fate and Effects Division
Environmental Protection Agency